The Central Law Journal.

SAINT LOUIS, NOVEMBER 1, 1878.

CURRENT TOPICS.

The question as to what constitutes an appropriation of land by a railway company, under the statutes allowing corporations to appropriate land, was raised in the recent case of *Beale v. Pennsylvania R. R.*, 6 W. N. 137. The Pennsylvania Railroad Co. filed a petition which set forth that, under its charter and the supplements thereto, it had located a new line of road, and prayed for the appointment of viewers to assess the damages due the owners of the land through which it passed. These were appointed and filed their report. The railroad company objected to its confirmation as to certain of the property holders, on the ground that the route of the portion of the proposed new road running through their land had been altered, and the court thereupon set aside so much of the report as assessed the damages on their land. The rest of the report was confirmed. On appeal, the Supreme Court of Pennsylvania held (reversing the judgment of the court below), that the company's location of its new road was an appropriation of the ground marked out, and vested a right to damages in the owners thereof that no subsequent alteration of the route could destroy. In Redfield on Railways, 3d ed. p. 240, the law is stated rather differently than in the present case, as follows: "Where the charter of the company provides that, after the appraisal of the land for its use, 'upon the payment of the same,' or deposit (as the case may be), the company shall be deemed to be seized and possessed of all such lands; 'they must pay or deposit the money before any such right accrues.' 'The payment or deposit of the money awarded is a condition precedent to the right of the company to enter upon the land for the purposes of construction, and without compliance with it they may be enjoined by a court of equity, or prosecuted in trespass at law for so doing. The right of the land-owner to the damages awarded is a correlative right to that of the company to the land. If the company has no vested right to the land, the land-owner has none to the price to be paid." This view is based on the cases of Stacey v. Vt. Central Railway, 27 Vt. 39; s. c., 1 Redfield R. W. Cases, 247; and Bloodgood v. Mohawk & Hud. R. R. Co., 18 Wend. 10. See 6 Weekly Notes, 139.

In *Blecker v. Johnston*, recently decided by the New York Court of Appeals, the effect of an omission of a party to testify in his own favor was in question. Plaintiff sued defendants, who were partners, for his services as clerk, and testified to an oral agreement made with one in the presence of the other. One of the defendants testified on their behalf, that he made the engagement on certain terms; the other defendant was not called. The trial court held that where the evidence is the testimony of parties to the suit, it is their duty to present their own testimony, if it be shown that they could have testified directly to the very point in controversy; and that when such a witness was within reach, and his evidence could be procured, the jury had a right to infer that his non-production is caused by the fact that his evidence would not be beneficial. They laid some stress upon the fact that according to plaintiff's testimony both the defendants took part in the conversation, but laid it down as a general rule that whenever the production of any evidence that may be stronger or more conclusive—of additional and more credible or cogent witnesses or instruments of evidence bearing on a controverted fact, by which the testimony might be made more apparent—is withheld, the imputation of weakness may well be suggested against the party who, without excuse, withholds such testimony, and a presumption indulged to the prejudice of his cause. The Court of Appeals, in reversing this judgment, hold that although the non-attendance of the absent defendant might have been a proper subject of remark, and the jury, if they thought his absence suspicious, might take a less favorable view of the testimony on the part of the defense, this was the extent to which plaintiff was entitled to any benefit from the circumstance; and it was error to charge that defendants were bound to produce him, and not having done so, the jury might infer that his evidence might be prejudicial to them. They, in effect, apply the

principle that such omission can not supply the place of evidence, but is only a circumstance to be considered in weighing evidence that is actually adduced. The omission to call another witness is not an omission to produce the best evidence. His testimony would be simply cumulative, and the omission does not necessarily imply fraud, or a design to suppress the truth. They accordingly ordered a new trial.

THE Supreme Court of Vermont, in the late case of *Whitney v. First Nat. Bank of Brattleboro*, held that national banks are not responsible for the safe-keeping of special deposits made according to usage, for the accommodation of depositors, though made with the knowledge and acquiescence of their directors —such deposits not being authorized by the national banking act, under which such banks are authorized. See, also, Wiley v. First Nat. Bank of Brattleboro, 47 Vt. 546; First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278; Weckler v. First Nat. Bank, 42 Md. 581. In Leach v. Hale, 31 Iowa, 7 Am. Rep. 112, the cashier advertised that the bank would convert 7-30 United States Government bonds into 5-20 bonds without charge. The plaintiff deposited in the bank 7-30 United States bonds to be converted into 5-20 bonds, and thereafter made a demand for the return of one or the other class of bonds, which was refused. The court held that the bank was not a mere mandatary, or bailee, acting without compensation, but was liable to the depositor for the value of the bonds, on its refusal to deliver them on demand; and that the business of receiving one class of United States bonds to be converted inso another, is within the scope of the powers conferred upon national banks by the act of Congress under which they are organized. The court say: "The transaction, in the light we are now considering it, amounts to the deposit of certain securities, with an undertaking to return those of a different class, and was within the scope of the business of the bank." In National Bank v. Graham, 79 Penn. St. 106, the facts were the same as in the principal Vermont case, but the court reached a different conclusion. The court held that "the mere act of the cashier in receiving the plaintiff's securities would not subject the bank to liability; but if the deposit was known to the directors, and they acquiesced in its retention, a contract relation was created by which the defendant should be held bound." See, also, Scott v. Nat. Bank of Chester, 72 Penn. St. 471; Coffey v. Bank, 46 Mo. 140; Foster v. Essex Bank, 17 Mass. 479. In the principal case it is said: "The powers of national banks being enumerated in the act of Congress by which they are created, the maxim *expressio unius est exclusio alterius*, if applied in the interpretation of this act, would prohibit national banks from entering into such a contract of bailment as the one in question, as a depositary, unless it is an implied power, necessary to carrying on the business of banking. We do not think it is. On the other hand, it would be hazardous for banks to possess and exercise this power; and it is no more incidental to them than to an insurance company or a manufacturing company, or any other corporation, to receive and keep in their vaults special deposits of securities and other property of great value, for safe keeping, without compensation, for the benefit of depositors, and thereby have resting upon them the liabilities of such depositary or bailee."

THE FIFTH VOLUME OF THE AMERICAN DECISIONS.*

The decisions in the fifth volume of this valuable series cover a period of three years, from 1810 to 1813, and embrace twenty-one volumes of reports from eleven states, viz: Massachusetts (7 and 8 Mass.), Connecticut (5 Day), New York (6, 7 and 8 Johns), Pennsylvania (3 and 4 Binney), Maryland (3 Harris & Johns.), Virginia (2 and 3 Munford, 1 Va. Cas.), North Carolina (2 Murphey), South Carolina (3 Brevard, 3 Desaussure), Kentucky (2 Bibb), Tennessee (2 Overton, 1 Cooke), and Louisiana (1, 2 and 3 Martin). Nearly two hundrad cases are reported, of which we have selected the following as being among the most interesting to lawyers.

In *Gilbert v. Williams*, 8 Mass. 51, where an attorney was sued for a loss caused by his disregarding the instructions of his client,

*The American Decisions, containing all the cases of general value and authority decided in the courts of the several states, from the earliest issue of the state reports to the year 1869. Compiled and annotated by JOHN PROFFATT, LL. B. Vol. V. San Francisco: A. L. Bancroft & Co., 1878.

SEDGWICK, J., lays down the law in such cases in these words: "There is no doubt that for any misfeasance or unreasonable neglect of an attorney, whereby his client suffers a loss, an action may be supported, and damages recovered to the amount of that loss. By this I do not mean that an attorney is to be answerable for every error or mistake, and to be punished for it by being charged with the payment of the debt which he was employed to recover for his clients; but, on the contrary, that he shall be protected where he acts with good faith, and to the best of his skill and knowledge. * * * Whenever an attorney disobeys the lawful instructions of his client, and a loss ensues, the attorney is responsible." In *Denton v. Noyes*, 6 Johns. 298, where an attorney had appeared for a defendant against whom a writ had been served and confessed a judgment, and had done all this without the authority or knowledge of the defendant, the judgment was held regular, though the court intimated that if the attorney who had thus appeared for the defendant were not responsible, the court would relieve against the judgment, and in this case allowed the defendant to come in and plead, though preserving the lien of the judgment. KENT, C. J., said that by licensing attorneys the courts "recommended them to the public confidence; and if the opposite party who has concerns with an attorney in the business of a suit, must always at his peril look beyond the attorney to his authority, it would be productive of great public inconvenience." VAN NESS, J., entered a vigorous protest against this rule. "One man," said he, "can not bind another without an express authority for that purpose. It would be an unpardonable waste of time to adduce authorities in support of so plain a principle. I know of no reason why an attorney of this court should be exempted from the operation of this principle. If it be once understood to be the law of the land that every attorney of this court may appear for any man in the community, whether he be sued or not, and confess a valid judgment against him, without his knowledge or consent, whereby his person may be taken in execution, or his property swept away without giving him an opportunity to prepare for the shock, I speak with all due deference, I tremble for the consequences. The whole profession, instead of being what it yet is, honored and respected, will, I fear, soon be considered, in fact, to be what a part has already been called, '*hostes humani generis.*'" The authority of this case, though not denied even at this day in New York, has been considerably modified. See Meacham v. Dudley, 6 Wend. 515; Ingalls v. Sprague, 10 Wend. 675; Brown v. Nichols, 42 N. Y. 26, and has likewise been followed in Pennsylvania and Vermont. Cyphert v. McClune, 22 Penn. St. 195; Abbott v. Dutton, 44 Vt. 546. On the other hand, in Iowa, New Jersey and Texas, the courts have refused to follow it. Harshey v. Blackmar, 20 Ia. 161; Price v. Ward, 1 Dutch. 225; Merritt v. Clow, 2 Tex. 582.

The meaning of the phrase "act of God," when set up by a carrier as a defense, was considered in *Colt v. McMechen*, 6 Johns. 160. In this case, while a vessel was beating up the Hudson river against a light wind, and running near the shore, the wind suddenly failed, in consequence of which she ran aground and sunk. It was held that the sudden failure of the wind was due to the act of God, and the carrier was excused. Two cases in this volume are directly opposed to each other. In *Burks v. Shain*, 2 Bibb, 341, the Supreme Court of Kentucky hold that in an action for breach of promise of marriage the plaintiff can not recover damages for seduction; while in *Conn v. Wilson*, 2 Overton, 233, the Supreme Court of Tennessee hold that she can.

As we have said of the former volumes of this series, slander cases, as regards their number, still continue to characterize the early reports. In *Nye v. Otis*, 8 Mass. 79, the words "he would venture anything the plaintiff had stolen the book," were held to support a verdict for damages. In *McClaughry v. Wetmore*, 6 Johns. 82, the parties were in a justice court, and one of them was giving his evidence in a case which was then on trial, when the other exclaimed: "That is false." It was held that an action would lie for the speaking of the words, as they involved a charge of perjury. That in the past the political press was no less abusive than at the present time, appears from the case of *Thomas v. Croswell*, 7 Johns. 264, where it was held libelous to publish of a member of Congress that "he is a fawning sycophant, a misrepresentative in Congress, and a groveling office-seeker; he has abandoned his post in Congress in pursuit of an office." There are half a dozen other

slander cases in this volume, to which reference need not be made. *People v. Ruggles*, 8 Johns. 289, was an indictment for blasphemy —a crime more common in the earlier reports than at the present day. In *Andres v. Wells*, 9 Johns. 260, the proprietor of a newspaper edited by another was held responsible for a libel published therein without his knowledge, following Rex v. Walter, 3 Esp. N. P. 21. *Brewer v. Weakley*, 2 Overton, 99, holds that it is actionable to utter such falsehoods of a candidate for a public office as will cause persons not to vote for him, the court remarking: "The heart which is nourished by the blood issuing from the wounds of mangled reputation, ought to be mended by the wholesome correction of law, if neither moral nor religious precept can effect it."

People v. Babcock, 7 Johns. 201, decides that where one had obtained a release of a judgment by falsely pretending that he had the ability to discharge it, no indictment will lie for the cheat. In *Shepherd v. Sawyer*, 2 Murphey, 26, a wagering contract was sustained. A, for a premium of two and a half per cent, agreed with B to insure a negro slave at the time reported to be lost on board a boat. B had no interest in the negro, but his loss being proved as reported, he was held entitled to recover.

Denis v. Leclerc, 1 Martin, 297, holding that the writer of a letter has such a property in it as to be able to prevent its publication, is one of the earliest cases in this country on this subject. This is a Louisiana case, and is considered with reference to the civil law. But the courts of England have several times protected by injunction the letters of eminent writers, as in the cases of Pope and Chesterfield; Pope v. Curl, 2 Atk. 342; Thompson v. Stanhope, Amb. 737. And these cases have been followed in this country. It appears that courts have sometimes hesitated to interfere in the case of letters having no distinct literary character, as mere friendly or business letters. In Grigsby v. Breckenridge, 2 Bush. 480, this subject is considered in a lengthy opinion. The right of property, and not the feelings of the writer, is the ground on which the courts proceed. Cicero, in one of his most celebrated orations, treats the case as a question of feeling. "This man," says he, "skilled in rhetoric and belles-lettre, yet ignorant of good manners, has produced letters which, he says, I wrote to him. Whoever, having the least tincture of civility or decency on a misunderstanding between himself and his friend, ever produced or read publicly, the letters he had received from him? What is this but to destroy the very life of society? How many jokes may be indulged in, in a letter which, when openly divulged, are improper? How many serious things, proper to be communicated in the privacy of one's correspondence, are unfit for the public eye? I thought I was writing to a citizen and a good man, not to a villain and a thief."

In *Pierce v. Fuller*, 8 Mass. 223, the defendant by an obligation under seal and for the consideration of one dollar agreed not to run a stage between Boston and Providence in opposition to the plaintiff's stage, under a penalty of two hundred and ninety dollars. In an action for a breach of the agreement the court held it not to be in restraint of trade, and treating the penalty as liquidated damages rendered judgment for the full amount. In *Commissioners v. Ross*, 3 Binney, 520 it is said that while there is no rule of law against granting a new trial after two concurring verdicts, yet it must be a very extraordinary case to call for the court's interference. From *Hayes v. Berwick*, 2 Martin (La.) 138, it appears that by the civil law death is never presumed from absence; an absentee is presumed to live until the contrary is proved or until he attains the age of 100 years. The common law rule is quite different. Where a person leaves the country the presumption of the continuance of life ceases at the expiration of seven years from the time when he was last heard of, and the presumption of death then arises. But except in this case there appears to be in the English law no *presumptio juris* as to the continuance of life, for in the unreported case of Atkins v. Warrington referred to in Best on Evidence and Chitty on Pleading, the Court of Queens Bench said that the law did not recognize the impossibility of a person who was alive in the year 1034 being still alive in the year 1837. [N. B.—In an edition of Mr. Best's elegant and learned treatise, edited by "James Appleton Morgan of the New York Bar," that unreliable compiler makes Mr. Best say that the law will not presume that a person is not alive three years after he is proved to be alive. It is possible this might

at some time mislead some one, were it not that the profession have been sufficiently warned that after a law book has passed under Mr. Morgan's editorial supervision, it is henceforth useless as authority.]

The editor's annotations continue excellent and are a decided feature of the series. His notes to *Riddle v. Proprietors*, 7 Mass. 169, as to the liability of corporations in actions of trespass; *Hitchcock v. Harrington*, 6 Johns, 290, as to merger of a mortgage, and to *Ewing v. Smith*, 3 Desaussure 417, as to the liability of a wife's separate estate to debts, are complete essays on the subjects of the leading cases. Notes less lengthy and exhaustive, but still containing abundant and valuable references are appended to eighteen other cases in this volume not referred to in this review. We are compelled to say, on the other hand, that the note to *Dash v. VanKleeck*, 7 Johns 477, as to the meaning and extent of the phrase *ex post facto* in the Constitution is far from complete. A reference to Mr. Justice Johnson's note in 2 Peters 631, should at least have been given and ought not have escaped the notice of the editor in his last revision of the work of his staff.

The *syllabi* to the cases in this series have, we are informed, been either revised or wholly rewritten by the editor; of its necessity an example is given on page 316. This has been without doubt a work requiring much skill and seems to have been performed in a very satisfactory manner, yet there have been some slips and one rather serious one in this volume. In *Thomas v. Croswell*, 7 Johns 264, our page 269 of this volume, the question of the admissibility, in an action for libel, of other libelous publications, in order to show malice, is considered at some length and decided. We do not know how it is in the original volume, but Mr. Proffatt's *syllabus* does not notice this point in the case. Yet it is a question of much interest having been raised in several very recent and notorious cases. See Scripps v. Reilly, 4 Cent. L. J. 128; Gibson v. Cincinnati *Enquirer*, 5 Id. 380. The evil attending an omission of this kind is that the index being made up from the *syllabi* all trace of a point not shown in the *syllabus* is lost. But this is but one fault among many excellencies, and may well be overlooked. It only remains for us to add that this undertaking still continues to merit the support of the profession.

FOREIGN WILLS—CONTESTS IN COURTS OF SISTER STATES.

HARRIS v. HARRIS.

Supreme Court of Indiana, May Term, 1878.

HON. WILLIAM E. NIBLACK, Chief Justice.
" HORACE P. BIDDLE, } Associate Justices.
" JAMES L. WORDEN, }
" GEORGE V. HOWK, }
" SAMUEL E. PERKINS, }

AN ACTION WILL NOT LIE to contest the validity of a will executed in another state, when a copy of such will and of the probate thereof, duly certified, are offered for filing and record in a court of Indiana. The statute of 1859 does not provide for contesting foreign wills in such cases, and if it did it would be in violation of the first section of the fourth article of the Constitution of the United States.

On the 11th day of April, 1873, the clerk of the court below issued letters of administration on the estate of Joshua Harris, deceased, to Thomas W. Morgan. On the same day Simeon K. Crume produced to the court a copy of the last will of said decedent, and of the record of the probate thereof, duly certified by the clerk and judge having custody thereof, of the County Court of Owen County, Kentucky, and also filed his application in writing, asking the court to order the said copy to be filed, recorded and allowed as the last will of said decedent.

This action was thereupon brought by the appellees, who were brothers and sisters of decedent, Morgan, the administrator, joining with them, to have the said will set aside, and the estate of said decedent administered as an intestate estate, etc., on the ground that the alleged will was void, because procured by undue influence, and because decedent was of unsound mind at the date of its execution. Issues being joined, there was trial and judgment for the plaintiffs, declaring the supposed will null and void. The questions properly presented to the supreme court call in question the jurisdiction of the court below over the subject-matter of the action, and the sufficiency of the facts stated in the complaint to constitute a cause of action.

T. C. and *L. M. Campbell*, for plaintiffs; *C. Foley*, for defendants.

HOWK, J., delivered the opinion of the court:

[The facts being already given, are omitted from the opinion.]

It is clear, we think, that actions to contest the validity, and resist or set aside the probate, of an alleged last will, are purely statutory; that is, they can only be brought and successfully maintained in the court within the time, and upon grounds prescribed in and by the statute which authorizes such actions. In this state we have several statutory provisions in relation to the proper venue of such actions, or

the county and court in which they must be commenced. In section 39 of "An act prescribing who may make a will," etc., approved May 31st, 1852, it is provided, *inter alia*, that an action to contest the validity, or resist the probate of any will, must be brought "in the court of common pleas of the county where the testator died, or where any part of his estate is." 2 R. S. 1876, p. 580. In section 31 of the practice act, approved June 18, 1852, it is provided that "an action to establish or set aside a will must be brought in the county in which the will, if valid, ought according to law to be proved and recorded." 2 R. S. 1876, p. 46. In section 23 of the said act prescribing who may make a will, etc., it is provided in substance that a last will must be proved in the county of which the testator, "immediately previous to his death," was an inhabitant; or, if the testator was not an inhabitant of this state, in the county in which he left assets, or into which his assets might thereafter come. 2 R. S. 1876, p. 576. By section 79 of an act abolishing the courts of common pleas, etc., approved March 6, 1873, it was provided that circuit courts should have the same jurisdiction that had theretofore "been exercised by the court of common pleas." 1 R. S. 1876, p. 390. Construing together all these statutory provisions, we reach the conclusion that in this state an action to contest the validity and resist or set aside the probate of an alleged last will, must be brought in the circuit court of the county whereof the testator was an inhabitant, "immediately previous to his death:" or if not such an inhabitant of this state, in the county in which he left assets, or into which his assets might have come. These are jurisdictional facts; and the rules of good pleading certainly require that in such an action the plaintiffs should allege one or more of these facts in their complaint. The averments of the appellees' complaint in this action were not very certain or specific in regard to these jurisdictional points; but we think they were sufficiently so to withstand the appellant's motion in arrest of judgment. Sutherland v. Hawkins, 56 Ind. 343.

We have heretofore considered this question of jurisdiction as if this were an ordinary action to contest the validity, and resist or set aside the probate of a domestic will, or of a will executed in this state. But such was not the character of the action presented by the record now before us. It appears from this record that a duly certified and attested copy of the last will of said Joshua Harris, deceased, and of the probate thereof in the County Court of Owen County, in the State of Kentucky, was produced by the appellant, Simeon K. Crume, as the executor of said will, and a legatee named therein, to the court below, at its April term, 1873, to be filed and recorded by the clerk of said court as the last will of said decedent. The will in question was apparently executed on the 15th day of March, 1873, by Joshua Harris, then "domiciled in Owen county, Ky.," and it "was produced in the Owen County Court at the special term held on the 31st day of March, 1873, for probate, and fully proven by the oaths of J. W. Johnson and H. P. Montgomery, the subscribing witnesses thereto, and ordered to be admitted to record as the true last will and testament of said decedent, which hath accordingly been done." The sufficiency of the certificates attached to the copy of the will and of the probate thereof, produced to the court below, were not questioned in that court, and they seem to us to conform to the requirements of the statute.

In section 34 of the act before referred to, "prescribing who may make a will," etc., it is provided that "any written will that shall have been proven or allowed in any other of the United States, or in any foreign country, according to the laws of such state or country, may be received and recorded in this state, in the manner and for the purpose mentioned in the two following sections." 2 R. S. 1876, p. 578.

Section 35 of said act reads as follows: "Such will shall be duly certified under the seal of the court or officer taking such proof; or a copy of such will and the probate thereof shall be duly certified under the seal of his court or office, by the clerk, prothonotary or surrogate who has the custody or probate thereof, and such certificate shall be attested and certified to be authentic, and by the proper officer, by the presiding or sole judge of the court, by whose clerk or prothonotary such certificate shall have been made, or if such will was admitted to probate before any officer, being his own clerk, his certificate of such will or record shall be attested and certified to be authentic, and by the proper officer, by the presiding or sole judge, chancellor or vice-chancellor, or the court having supervision of the acts of such officer."

In section 36 of said act it was provided: "Such will or copy and probate thereof may be produced by any person interested therein, to the court of common pleas of the county in which there is any estate on which the will may operate, and if said court shall be satisfied that the instrument ought to be allowed as the last will of the deceased, such consent shall order the same to be filed and recorded by the clerk; and thereupon such will shall have the same effect as if it had been originally admitted to probate and recorded in this state." 2 R. S. 1876, p. 579.

Section 37 of said act provides that "no will executed in this state, and proven or allowed in any other state or county, shall be admitted to probate within this state, unless executed according to the laws of this state."

These four sections contain all the provisions of said act in relation to what may be termed "foreign wills," that is, written wills not executed in this state, "which have been proven or allowed in any other of the United States, or in any foreign country, according to the laws of such state or country," before the production of such wills, or of copies thereof and of the probate thereof, to the courts of this state. It will be seen that provision is made in section 35 for the production, in the courts of this state, *first*, of such wills, duly certified, etc., and *secondly*, of copies of such wills, and the probate thereof duly certified, etc. In the act referred to it is very certain that no provision whatever was made for contesting the validity and resisting or setting aside the probate of such for-

eign wills, or of the copies thereof and of the probate thereof, where the same or either of them may be produced to the proper courts of this state upon any grounds whatever.

In 1859, however, an act was passed by the general assembly of this state, entitled "An act supplemental to 'An act prescribing who may make a will, the effect thereof, etc., approved May 31, 1852.'" Approved February 1, 1859. Omitting the enacting clause, the first section of this supplemental act provided: "That in all cases of foreign wills and testaments, heretofore admitted or hereafter to be admitted to probate, or which may have been or may be offered for record and filing in any county in this state, any person interested in the estate of the testator, may contest such will or testament within the time, in the manner, and for any or all the causes prescribed by the laws of Indiana, in cases of the contest of domestic wills," etc. 2 R. S. 1876, p. 579, note 2.

It is evident, we think, that this supplemental act is applicable in its terms only to the first case mentioned in said sections 35 and 36; that is to the case where the foreign will, itself duly certified, etc., is offered to the proper court of this state, either for probate, or for filing and record. It is certain that this supplemental act does not, in express terms, provide for contesting in the courts of this state a foreign will, when a copy thereof and of the probate thereof, duly certified, etc., may be offered therein for filing and record. The constitutionality of said act as it reads is at least questionable; but if it provided for contesting, in the courts of this state, a foreign will, when a certified copy of such will and of the probate thereof in the proper court of any other of the United States, was produced therein for filing and record, it is clear, we think, that such a provision would be in violation of both the letter and spirit of the first section of the fourth article of the Constitution of the United States, which requires that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

In our opinion the strict letter of this supplemental act did not give the court below jurisdiction of the subject of this action, and it is not a case in which the letter of the statute should be enlarged or waived by judicial construction. The record of this cause shows very clearly that the appellees relied upon the provisions of this supplemental act in bringing their action. The certified copy of the will and of the probate thereof is mentioned in, and by reference is made part of the appellee's complaint. The jurisdiction of the county court of Owen county, Kentucky, in the probate of said will, is not controverted or denied by any direct averment in said complaint. But without regard to this question, or to the character and effect of the judgment of said county court in the probate of said will, it seems to us that the appellee's action is not authorized by any of the legislation of this state, and that the action was for this reason not within the jurisdiction of the court below.

[The court further held that the complaint did not state a sufficient cause of action because the administrator of the decedent's estate could not maintain an action to contest the validity of the will, and in such a case could have no joint cause of action with the heirs at law of the decedent.]

JUDGMENT REVERSED.

STOLEN BILL OF EXCHANGE—LIABILITY OF ACCEPTOR—ESTOPPEL.

BAXENDALE v. BENNETT.

English Court of Appeal, July, 1878.

IN AN ACTION by a *bona fide* holder of a bill of exchange against the acceptor, the defendant is not estopped from denying that he accepted the bill, if at the time when he accepted the bill there was no drawer's name inserted, but the draft of the bill was obtained from him by the commission of a crime, and a drawer's name subsequently filled in without the defendant's knowledge or consent.

This was an action on a bill of exchange by the plaintiff, as holder, against the defendant, as acceptor.

The defendant having had some transactions with a Mr. Holmes, received from him a blank draft in Holmes' handwriting. The defendant accepted and returned the draft to Mr. Holmes, who, not needing it, sent it back to the defendant, by whom it was placed in a drawer, which was left unlocked in his private room. At this time there was no drawer's name upon the draft. The draft was subsequently stolen from the defendant, and when it came into the plaintiff's hands, who was a *bona fide* holder for value, the document had been completed as a bill of exchange by the name of one Cartwright having been added as drawer, without the defendant's knowledge or consent.

At the trial before LOPES, J., without a jury, judgment was entered for the plaintiff on the ground that by not destroying the draft, and placing it in an unlocked drawer, the defendant led to the bill being put into circulation and that it came into the possession of the plaintiff without any just reason to suspect the circumstances, and that the case could not therefore be distinguished from Young v. Grote, 4 Bing. 253, and Ingham v. Primrose, 7 C. B. N. S. 82. From this decision the defendant appealed.

BRAMWELL, L. J.:

I am of opinion that this judgment can not be supported. The defendant is sued on a bill alleged to have been drawn by one Cartwright on and accepted by him. In very truth, he never accepted such a bill, and if he is to be held liable it can only be on the ground that he is estopped from denying that he did so accept the bill. Estoppels are odious, and the doctrine should never be applied without the necessity for it. It never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done or failed to say or do that he would, unless estopped, be saying something

contrary to his former conduct in what he had said or done or failed to say or do. Is that the case here? Let us examine the facts.

The defendant drew a bill, or what would be a bill had it had a drawer's name, without a drawer's name, addressed to himself, and then wrote what was in terms an acceptance across it. In this condition, it not being a bill, it was stolen from him, filled up with a drawer's name, and transferred to the plaintiff a *bona fide* holder for value. It may be that no crime was committed in the filling in of the drawer's name, for the thief may have taken it to a person telling him it was given by the defendant to the thief with authority to get it filled in with a drawer's name by any person the thief pleased. This may have been believed, and the drawer's name *bona fide* put by such person.

I do not say such person could have recovered on the bill. I am of opinion he could not, but what I wish to point out is that the bill might be made a complete instrument without the commission of any crime in the completion. But a crime was committed in this case by the stealing of the document, and without that crime the bill could not have been complete, and no one could have been defrauded. Why is not the defendant at liberty to show this? Why is he estopped? What has he said or done contrary to the truth, or which should cause any one to believe the truth to be other than it is? Is it not a rule that every one has a right to suppose that a crime will not be committed, and to act on that belief? Where is the limit if the defendant is estopped here? Suppose he had signed a blank cheque, with no payee, or date, or amount, and it was stolen, would he be liable or accountable, not merely to his banker, the drawee, but to a holder? If so, suppose there was no stamp law, and a man simply wrote his name, and the paper was stolen from him, and somebody put a form of a cheque or bill to the signature, would the signer be liable? I can not think so. But what about the authorities? It must be admitted that the case of Young v. Grote, and the case of the bill torn in two (Ingham v. Primrose) go a long way to justify this judgment, but in all those cases, and in all the others where the alleged maker or acceptor has been held liable, he has voluntarily parted with the instrument; it has not been got from him by the commission of a crime. This undoubtedly is a distinction, and a real distinction.

The defendant here has not voluntarily put into anyone's hands the means, or part of the means, for committing a crime. But it is said he has done so through negligence. I confess I think he has been negligent, that is to say, I think if he had had this paper from a third person as a bailee bound to keep it with ordinary care, he would not have done so. But then this negligence is not the proximate or effective cause of the fraud—a crime was necessary for its completion. Then the Bank of Ireland v. Evans' Trustees, 5 H. L. C. 389, shows that under such circumstances there is no estoppel. It is true that was not the case of a negotiable instrument, but those who complained of the negligence were the parties immediately affected by the forged instrument.

BRETT and BAGGALLAY, L.JJ., concurred.
Appeal allowed.

NOTE.—The broad general principle applicable to forged commercial paper is, that no man can be charged save by his own act; and the universal rule is that of the two a victimized *bona fide* holder of such paper must suffer, rather than an equally innocent person, whose name has been used without authority. But when a party has actually signed the instrument, the courts, in pursuance of the policy of the law merchant, which has always tended toward complete protection of innocent holders of commercial paper, are accustomed to scrutinize zealously any attempt to escape liability to a *bona fide* holder for value. It has been decided again and again in this country and in England, that if the instrument was executed in blank and the blanks were filled with amounts in excess of the authority given by the maker, such facts would be no defense against a holder for value without notice. Huntington v. Branch Bank, 3 Ala. 186; Moody v. Threlkeld, 13 Ga. 55; Toney v. Fisk, 10 S. & M. 590; Tumilty v. Bank of Missouri, 13 Mo. 276; Gaisson v. Fite, 1 Head, 332. But the leading case on this subject is that of Young v. Grote, cited in the above opinion. There the plaintiff left several blank checks with his wife for her use during his absence. She requested her husband's clerk to fill one of them up for the sum of *fifty pounds two shillings*. He did so, writing the *fifty* with a small letter and placing it in the middle of the line; the figures 50, 2s were also placed at a considerable distance from the printed £. In this state he showed it to her and was instructed to get the money upon it. Whereupon he inserted in the beginning of the line in which the word *fifty* was written, the words *three hundred and*, and the figure 3 between the £ and the 50. The bankers paid the £350, 2s. It was held that the loss must fall upon the plaintiff rather than upon the bankers, "on the ground that they had been misled by a want of proper caution on the part of the customer." Isnard v. Towes, 10 La. Ann. 103, decided on the authority of this case, is exactly similar to it in principle. There the court say "that where one of two parties, neither of whom has acted dishonestly, must suffer, he must suffer who by his own act occasions the confidence and consequent injury to the others." The case of Ingham v. Primrose is not so completely in point. It arose upon a bill of exchange which, after being torn into two pieces, for the purpose of cancellation, was joined together and negotiated. The maker who had been negligent was held liable to an innocent holder for value. The court in Baxendale v. Bennett relies upon the fact that the draft was stolen; that a crime was necessary before its completion was possible, to distinguish this case from the two above mentioned. This doctrine is not in consonance with the principle of the law merchant, which gives to negotiable paper the property of passing current as cash and protects an innocent holder for value, whatever may be the invalidity of the title of the person from whom he derived his possession. In other words, title in the case of negotiable paper follows the possession of a *bona fide* holder for value. The importance of this quality of mercantile paper to commercial welfare is illustrated very happily by the case of Miller v. Race, 1 Sm. L. C. 736. It was a suit by an innocent holder of a bank note, which had been stolen from the mail and passed to him in the ordinary course of trade, against a clerk in the bank who refused, under the instructions of the person from whom it had been stolen, either to pay the note or to return it to the plaintiff. On Friday afternoon, after the cause had been heard, and just before the court adjourned until Monday, Lord Mansfield said that defendant's case had been "argued so ingeniously that (though he

had no doubt about the matter) it might be proper to look into the cases cited, in order to give a proper answer; and, therefore, the court deferred giving their opinion. But at the same time," Lord Mansfield said, "he would not wish to have it understood in the city that the court had any doubt about the point." The principle here decided is supported by Gorgier v. Mieville, 3 B. & C. 45; Grant v. Vaughn, 3 Burrow, 1516; Anonymous, 1 Ld. Raymond, 738; s. c., 1 Salk. 126. The same rule has been repeatedly announced in the American courts. Said Stites, J., in Caruth v. Thompson, 16 B. Mon. 576: "The adoption of any other rule, or the application of the principle of *caveat emptor* to persons thus honestly acquiring such paper, would necessarily tend to impair confidence in that species of commercial securities and diminish greatly its usefulness for purposes of trade." Goodwise v. Gleason, 3 Day, 12; Bond v. Central Bank, 2 Ga. 92; Faulkner v. Ware, 34 Ga. 498; Farlin v. Lovejoy, 29 Ill, 45; Jones v. Nellis, 41 Ill. 482; Glover v. Jennings, 6 Blackf. 10. From these cases it will be seen that if the draft had been in a complete state at the time it was stolen there would have been no difficulty about the plaintiffs acquiring a complete and perfect title. The doctrine of estoppel is "a convenient scarecrow," but it certainly does not enter into this case at all. It is hard to see what should invalidate this paper in the hands of an innocent holder for value. Certainly not the fact that it was stolen; that can not be maintained. Nor the fact that the blank name of the drawer was filled in without the knowledge, consent or authority of the acceptor. That is not the doctrine of Young v. Grote. The two elements of theft and unauthorized filling of the blank combined can have no more effect to vitiate the innocent holder's title than either circumstance taken singly would. The two together can not make the transaction any more distinctly *in invitum* than either of them alone. In view of these authorities it seems that the doctrine of this case may be considered doubtful. W. L. M., JR.

REMOVAL OF CAUSES.

TAYLOR v. ROCKEFELLER.

United States Circuit Court, Western District of Pennsylvania, June, 1878.

Before Mr. Justice STRONG.

1. WHEN APPLICATION MUST BE MADE. — In an application for removal of a cause from a state to a federal court, the petition and bond must be filed "before or at the term at which the cause could be first tried, and before the trial thereof."

2. IT IS THE FEDERAL COURT and not the state court that has the power to adjudge whether the case is a proper one for removal under the act of Congress.

3. CITIZENS OF DIFFERENT STATES—WHEN CAUSE REMOVABLE.—Under the Act of 1875, although some of the formal or nominal plaintiffs and defendants may be citizens of the same state, still if it is shown that it is a controversy wholly between citizens of different states, and can be fully determined *as between them*, then it is a cause that can be removed to the federal court.

Motion to remand the case to the Common Pleas of Butler county, from which it had been removed under the act of Congress of March 3, 1875, by Rockefeller and Flagler, two of the defendants, and citizens of the State of Ohio.

George Shiras, Jr., *M. W. Acheson* and *John M. Miller*, for the motion; *R. P. Ranney*, *McJunkin & Campbell*, *Robert Woods*, *D. T. Watson and Hampton & Dalzell*, contra.

Mr. Justice STRONG:

Three reasons are assigned in support of the motion to remand this case to the state court. They are as follows: First, that the application to remove the case into this court was not made in time. Secondly, that if the application was in time, the record discloses that the state court, in the due and orderly exercise of its own jurisdiction, has adjudged that the record and petition did not exhibit a case proper for removal under the acts of Congress, and has refused to part with its jurisdiction. And thirdly, that the record clearly shows this court can have no jurisdiction of the case.

Of the first reason little need be said. The act of Congress of March 3d, 1875, has greatly enlarged the jurisdiction of the Circuit Courts of the United States, and enlarged correspondingly the right of removal of civil suits from the state courts. The second section of the act enacts as follows: "That any suit of a civil nature, at law, or in equity, now pending or hereafter brought in any state court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state, claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects, either party may remove said suit into the Circuit Court of the United States for the proper district. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined, as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy, may remove said suit into the Circuit Court of the United States for the proper district."

The third section prescribes the time when such removal may be made, and the manner in which it may be effected. It enacts that either party, or any one or more of the plaintiffs or defendants entitled to remove the suit, may make and file in the suit in the state court a petition for the removal, before or at the term at which the cause could be first tried, and before the trial thereof, together with a bond with surety, etc. It is then made the duty of the state court to accept the petition and bond, and proceed no further in the suit. The petition and bond must be filed "before or at the term at which the cause could be first tried, and before the trial thereof." In this case the bill was brought to the March term, 1878, of the state court. It was filed on the 8th of February, 1878; a motion was instantly made for a receiver, and the 20th of

February was assigned for hearing the motion. On the 18th of February the defendants entered their appearance, and moved to postpone hearing of the motion for a receiver until the 27th. This motion the court denied, but postponed the hearing one day. On the 21st of February the defendants filed a joint answer under oath, denying most of the material averments of the bill, together with affidavits. On February 25th the court appointed a receiver, and on the 5th of March, 1878, the petition for removal of the suit into this court was filed, together with the required bond. They were filed before the first term of the common pleas, subsequent to filling the bill, commenced. The recital of the facts, as they appear by the record, without more, is sufficient to show that the application for removal was made in due time.

The second reason advanced for remanding the case is equally without merit. If a proper petition and bond were filed in due season, as we have seen they were, and if the petition and record exhibited a case which the petitioners had a right to remove, it was not in the power of the state court to deny the right by any judgment it could give. The act of Congress declares that after the petition and bond are filed, the state court shall proceed no further in the suit. The petition is filed *in the suit*. It thus is made part of the record, and, by the act of filing, the suit is withdrawn from the jurisdiction of the state court. It may be admitted that when the petition, read in connection with the other parts of the record, does not show a case of which the circuit court has jurisdiction, the jurisdiction of the state court is not ousted. In such a case that court may proceed. It may therefore examine the petition and record, but its judgment upon the question whether a proper case appears for removal is not conclusive upon the circuit court. It is to be observed that no order of the state court for a removal is necessary; certainly none since the act of 1875. Nor is any allowance required. The allowance is made by the statute. Hence when the petition and record exhibit a case for removal, coming within the statute, all jurisdiction of the state court terminates. It has even been said every subsequent exercise of jurisdiction by that court is '*coram non judice*,' null and void. Such was the language of the Supreme Court in Gordon v. Longest, 16 Pet. 97, and this declaration has been repeated in other courts. This would seem to follow from the fact that subsequent action by the state court is expressly prohibited by the act of Congress. But whether this declaration was strictly accurate when it was made, or not; whether subsequent exercise of jurisdiction by the state court was not void, but merely erroneous, it is unimportant now to consider: for plainly, since the act of 1875, the power of removal and the jurisdiction of the federal court is made independent of any action or non-action of the state court upon the application. The 5th section of the act requires the circuit court to dismiss a suit which has been removed, or remand it whenever it shall appear to its satisfaction that it does not involve a dispute or controversy properly within the urisdiction of the circuit court. A decision of the state court, therefore, that the cause sought to be removed is one of which the circuit court has jurisdiction, can have no effect It can not force jurisdiction upon the circuit court, nor can it deny jurisdiction to it. And further, the 7th section empowers the circuit court, to which any cause shall be removable under the act, to issue a writ of *certiorari* to the state court commanding said court to make return of the record in any such cause, removed as aforesaid *or in which any one or more of the plaintiffs or defendants have complied with the provisions of the act for the removal of the same*, and enforce said writ according to law. Surely it would be no sufficient return to such a writ that the state court had decided the case was not one which could be removed, or had decided that the circuit court had no jurisdiction. So, also, it may be inferred from another provision of the act that no action of the state court can prevent or hinder the removal. A severe penalty is imposed upon the clerk of the state court who shall refuse to any one or more of the parties applying to remove a cause, a copy of the record therein, after tender of the legal fees for such copy. The copy must be furnished for filing in the circuit court to any party *applying* for removal, without reference to any action the state court may have taken.

For these reasons we think the refusal of the Court of Common Pleas, to allow the removal of the case into this court, is immaterial.

The third reason urged in support of the motion to remand is the most important one. If it be true indeed that the case is one of which this court has no jurisdiction, it is our duty to remand it to the court from which it has been removed. Whether we have jurisdiction or not depends both upon the citizenship of the parties and the controversy involved. What the citizenship is must be determined from the bill filed by the plaintiffs; and to the bill with its exhibit, the answer and the petition for removal, alone, can we look, for the controversy between the parties, so far as it bears upon our jurisdiction. Taylor, one of the plaintiffs, is a citizen of New York, and his co-plaintiffs, citizens of Pennsylvania. Rockefeller and Flagler, the petitioners for removal, are two of the defendants, and they are both citizens of Ohio. The other defendants sued with Rockefeller and Flagler, are citizens either of Pennsylvania or of New York. The petitioners are, therefore, citizens of a different state from those of which the plaintiffs are citizens, though some of the plaintiffs and some of the defendants are citizens of the same state, viz., Pennsylvania. Such being the citizenship, it may be admitted that, as the law was before the enactment of the act of 1875, the petitioners would have had no right to remove the cause into the circuit court, and that court would have had no jurisdiction, because each of the plaintiffs was not capable of suing each of the defendants in a Federal court. So it was ruled in Strawbridge v. Curtis, 3 Cranch, 267, when the twelfth section of the Judiciary Act of 1789 was under consideration, and this has been the constant construction of that act. Similar rulings have been made with reference to the acts of 1866 and 1867: Case of the Sewing Machine Com

panies, 18 Wall. 553; Knapp v. R. R. Co., 20 Wall. 122. Such was the general rule. It was not, however, of universal application. Even in Strawbridge v. Curtis, the court declined giving an opinion of a case where several parties represent several distinct interests, and some of the parties are, and others are not competent to sue, or liable to be sued in the courts of the United States. And the rule has often been held not to apply to merely formal parties. Thus in Wood v. Davis, 18 How. 468, it was said by the Supreme Court: "It has been repeatedly decided by this court that formal parties, or nominal parties, or parties without interest, united with the real parties to the litigation, can not oust the Federal courts of jurisdiction if the citizenship or character of the real parties be such as to confer it." The court has gone much further. In Shields v. Barrow, 17 How. 139, speaking of parties to a bill in equity, they were described as, 1st, formal parties; 2d, necessary parties; and. 3d, "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree can not be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." Such are indispensable parties. And subsequent decisions hold that it is only when an indispensable party defendant was a citizen of the same state with the plaintiff that the jurisdiction of the Federal courts was defeated. Ober v. Gallagher, 93 U. S. 204.

But whatever may have been the doctrine held prior to the act of Congress of 1875, that act has introduced great changes of the law. The first section extends the jurisdiction of the circuit courts nearly, if not quite, as far as the second section of the third article of the Constitution authorizes, alike in regard to the subject-matter of suits, and to the citizenship of the parties. It adopts the words of the Constitution. The second section relates to the removal of suits from state courts into United States Circuit Courts, and it follows the language of the first section. Hence, any cause which might have been commenced in the circuit court, either because of its subject-matter or the citizenship of the parties, may be removed from a state court into the Federal one. The question always is whether, on account [of] the citizenship of the parties or the subject of the controversy, the Federal court has jurisdiction.

Whether, since the act of 1875, the right of removal extends to all cases in which some of the necessary or indispensable defendants are citizens of the same state with the plaintiffs, or some of them, is no doubt a very important question not yet decided. It does not, if the rule of construction applied to the judiciary act of 1789, and the acts of 1866 and 1867 is applicable to the later act. But the later act, for the first time, adopts the language of the Constitution, and seems to have been intended to confer on the circuit courts all the jurisdiction which, under the Constitution, it was in the power of Congress to bestow. Certainly the case mentioned would be a controversy between citizens of different states, and the reasons which induced the framers of the Constitution to give jurisdiction to the Federal courts of controversies between citizens of different states, apply as strongly to it as they do to a case in which all the defendants are citizens of a state other than that in which the plaintiffs are citizens, and if that instrument is to be construed so as to carry out its intent, it would seem the question should be answered in the affirmative. However that may be, it is certain the act of 1875 confers a right to remove cases which could not have been removed under any former act. It expressly declares that when, in any suit mentioned in the second section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined *as between them*, then either one or more of the plaintiffs or defendants actually interested in such controversy, may remove said suit into the circuit court. It is not where the controversy, or even the main controversy, is between such citizens. The meaning of the clause is not obscure. In many suits there are numerous subjects of controversy, in some of which one or more of the defendants are actually intererested, and other defendants are not. The right of removal is given where any one of those controversies is wholly between citizens of different states, and can be fully determined as between them, though there may be other defendants actually interested in other controversies embraced in the suit. The clause, "a controversy which can fully be determined *as between them*," read in connection with the other words, "*actually interested in such controversy*," implies that there may be other parties to the suit, and even necessary parties, who are not entitled to remove it. Such other parties must be indispensable to a determination of that controversy which is wholly between the citizens of different states, or their being parties to the action is no obstacle to a removal of the case into the circuit court.

If this is a correct construction of the act of Congress, the case in hand is free from difficulty. The petition of Rockefeller and Flagler for removal, asserts that the controversy is wholly between them and the plaintiffs, and that as between them it can be fully determined. The motion to remand traverses no fact set out in the petition. It simply presents the question whether the facts asserted in the record show that under the act of Congress the case was improperly removed, and that this court has no jurisdiction of it. The fifth section of the act provides that, if at any time it shall appear that such suit does not really and substantially *involve a dispute or controversy properly within the jurisdiction of the* circuit court, that court shall proceed no further therein, but shall remand it to the court from which it was removed. Looking then to the bill and answer, do they involve such a controversy? We cannot doubt that they do.

The bill, with its exhibit, made a part of the bill, charges that the plaintiffs, together with one Vandegrift and one Foreman, sold an undivided half-interest in their oil-producing properties to the defendants (not naming them), and entered into a partnership with the defendants (not naming

them), having for its object the purchase and operation of oil-producing territory, and the production and sale of crude petroleum. It further charges that, at the time of entering into the contract of partnership, a written contract was executed between certain trustees of the first part, the plaintiffs, and Vandegrift and Foreman, of the second part, and Rockefeller and Flagler, of the third part, confirmed by the other parties defendant, providing for the manner in which the title to the lands and property of the partnership should be acquired, held and disposed of, and fixing a limitation and method of dissolution of the partnership. A copy of this agreement is annexed to the bill, and made a part of it. From the whole tenor of the bill it is evident that agreement is what s called the contract of partnership. But on reference to it, its purpose was not to create or evidence a partnership. It is a mere declaration of trust. The parties to it are Taylor and Bushnell, two trustees, of the first part, whose duty is to hold the lands conveyed to them, and to manage them, to operate, control and sell them for the sole and exclusive benefit of Taylor, Vandegrift, Foreman, Pitcairn, and Sutterfield, of the second part, and Rockefeller and Flagler, of the third part. There are no other parties to the agreement. The parties mentioned as of the third part are petitioners for the removal of the case. They are the only defendants named in the contract. The other defendants, it is true, appear to have joined in one of the conveyances of land conveyed to the trustees, and by a separate instrument they expressed assent to the agreement, and declared that their conveyance was made for the purpose set forth in it. But they entered into no covenants, and assumed no obligation to the plaintiffs. Looking more minutely to the contract, it appears that Taylor and Bushnell, the trustees, and parties of the first part, were constituted managers of the property and the interests of the trust, for a compensation to be fixed. All the other parties were at best mere *cestuis que trust*, and it was stipulated that in case profits were divided they, together with all proceeds of sale, should be divided monthly, or oftener if the executive committee should so decide, and paid one-half to Taylor for the second party, and the other half to Henry M. Flagler, for the third party. Beyond doubt, therefore, Rockefeller and Flagler are the main defendants in this suit. There are no other indispensable defendants. If those who have not petitioned for a removal of the suit into this court have any interest at all in it, it is because Rockefeller and Flagler, the petitioners, are their trustees, a matter in which the plaintiffs have no interest. Conceding that those other defendants are *cestuis que trust* of Rockefeller and Flagler, which does not clearly appear, they are not necessary parties to the bill. They are represented by their trustees: Kerrison, Assignee, v. Stewart, 93 U. S. 159. And the fact that they have been made parties by the plaintiffs is, under the act of 1875, no obstacle to the removal of the case into the Federal court. 2 Woods, 126; Osgood v. R. R. Co., 6 Biss. 330; Turner v. R. R. Co., Dillon on Removal of Causes, 34, note. The case, therefore, plainly involves a controversy which is wholly between the plaintiffs and Rockefeller and Flagler, and which can be fully determined *as between them*. If there are other controversies, in which the other defendants are interested, they are merely incidental; they are not the main controversy. The real controversy, as appears on the face of the bill, independent of the answer and the petition for removal, is between the plaintiffs and Rockefeller and Flagler, the second and third parties to the trust agreement. This is true whether the third parties are solely interested in one-half of the trust property, or whether they are trustees of the other defendants.

Indeed, according to the literal reading of the statute (a reading quite in harmony with the Constitution), the right of removal, and the jurisdiction of this court exists, though the controversy between the plaintiffs and the defendants, who are petitioners for the removal, be not the main controversy in the case. It is enough if there be a controversy wholly between citizens of different states, which can be fully determined *as between them*, though it may not be fully determined as between the plaintiffs and the other defendants. The phrase, "as between them," is significant. And there is no necessary embarrassment attending such a removal. The entire suit is removed because of the controversy it involves between citizens of different states, and the circuit court, having thus obtained jurisdiction, is competent to determine all the controversies involved between the plaintiffs and the other defendants. The other questions are regarded as incidental. This is in accordance with the acknowledged practice, and with the adjudications. It has even been ruled that supplementary, auxiliary or dependent proceedings, though commenced by original bill, and involving only controversies between citizens of the same state, will be entertained in the Federal courts when necessary to a complete determination of all the matters growing out of a controversy in those courts between citizens of different states. Jones v. Andrews, 10 Wall. 333, and cases in note.

But in this case it is unnecessary to invoke such decisions. The case, as exhibited by the bill of the plaintifffs, is one of property equitably held in common, to be managed and divided as stipulated in an agreement, and the object of the suit is to terminate the trust declared, and to have the property sold and divided according to the equities of the parties interested. The agreement itself provides how the division shall be made. Any rights to the profits, or proceeds of sale, not belonging to the second or third parties, that is, not belonging to the plaintiffs, or Rockefeller and Flagler, are only incidental. The entire property described in the agreement, together with all rights to it, and all duties in relation to its management belong to the plaintiffs and Rockefeller and Flagler. If the other defendants have claims against the latter, they are outside of the real controversy, and are claims in which the plaintiffs have no interest.

We think, therefore, the case was property removed into this court, and the motion to remand it to the state court is denied.

RAILWAY AID BONDS—CONFLICTING DECISIONS OF STATE AND FEDERAL COURTS.

WESTERMANN v. CAPE GIRARDEAU COUNTY.

United States Circuit Court, Eastern District of Missouri, September Term, 1878.

Before Hon. JOHN F. DILLON, Circuit Judge.

1. THE SUPREME COURT OF THE UNITED STATES having held the "Township Railroad Aid Act" of Missouri constitutional (Cass Co. v. Johnson, 5 Cent. L. J. 506), it is the duty of the circuit court to follow that judgment, notwithstanding the later decision of the Supreme Court of Missouri to the contrary.

2. WHERE NEGOTIABLE COMMERCIAL SECURITIES ARE ISSUED AND NEGOTIATED *before* there is any decisions by the courts of the state against the validity of the act authorizing their issue, the Supreme Court of the United States does not consider itself bound to follow a *subsequent* decision of the local courts invalidating such securities, but will decide for itself whether, under the constitution and laws of the state, such securities are valid or void.

3. RECITALS IN BONDS—BONA FIDE HOLDER—ESTOPPEL.—The bond sued on in this case being in the hands of a *bona fide* holder, containing a recital on its face that it was issued to pay for a subscription to the Cape Girardeau & State Line Railroad, the county can not be heard to say that the subscription therein specifically recited was not made.

4. THE FACT THAT IN THIS CASE the requirement, of a two-thirds vote is contained in a provision of the constitution instead of being a legislative enactment, makes no difference in principle.

Finkelnburg & Rassieur and *Kehr & Tittman*, for plaintiff; *Louis B. Houck*, for defendant.

DILLON, J., delivered the following oral opinion:

This is an action by the plaintiff on what are known in this state as township railroad aid bonds. The question now to be decided, arises on a demurrer to several pleas or special defenses. First. The petition does not set forth, as it is advisable to do, a copy of one of the bonds to which the coupons in suit were attached. The nature of the obligation, however, is stated in the petition: That in the year 1869, the defendant, the County of Cape Girardeau, issued a bond on behalf of Cape Girardeau Township, negotiable in form, to the Cape Girardeau and State Line Railroad Company or bearer, and containing this recital: "This bond is issued persuant to an order of the county court of said county, made by authority granted by an act of the General Assembly of the State of Missouri, entitled 'An Act to Facilitate the Construction of Railroads in the State of Missouri, approved March 23, 1868," in payment of the subscription made to the capital stock of the said Cape Girardeau and State Line Railroad Company, by the Municipal Township of Cape Girardeau, and authorized by a vote of more than two-thirds of the voters of said township, at an election held for that purpose in said township, on the 13th day of April, 1869."

That is the first act in this state, and, I believe, the only act that authorized townships to aid railroads by subscriptions and the issuing of bonds.

Now, about six years ago, the question of the validity of this subscription came before the Supreme Court of the State of Missouri, in the case of Ranney v. Baeder, 50 Mo. 600. The objection urged in that case against the validity of that subscription was, that the particular railroad to which the subscription was made was not specified with sufficient certainty in the petition of the tax payers asking for the submission, and in the order of the county court making the subscription. In that case the petition and all orders of the county court in reference to this subscription, were before the supreme court of the state, and the result was that it was adjudged a valid one. Judge Wagner, after referring to a case in the Supreme Court of Missouri, and one in the Supreme Court of the United States, says: "The two cases just referred to show that there must be reasonable certainty in the matter of voting and ordering the subscription, and that the subscription must be made to the road authorized in the power delegated to the agent. Tested by these principles, we think the subscription in this case was entirely valid. As no other fault is found with the proceeding, and as every step taken seems to have been done in a formal and regular manner, I entertain no doubt about the subscription. The objections urged are entirely too refined and technical."

And the judgment of the court below holding this an invalid subscription was reversed. That was in 1872. That is the precise objection that is reproduced in the fifth plea in this case; and we are asked to say that these bonds are invalid because the particular railroad was not specified with sufficient certainty in the proceedings.

There are two objections to holding this to be good: The first is, that the Supreme Court of Missouri, in 1872, decided that these proceedings in a case where the whole record was before it, were regular. But it is now urged that Judge Wagner was mistaken in reference to the charter and amended charter recited therein. I think it very doubtful whether he was or not; certainly a bondholder can not be supposed to know more in relation to this matter than the Supreme Court of Missouri. However that may be, this bond recites on its face that it was issued to pay for a subscription made to the Cape Girardeau & State Line Railroad. The county court can not be heard, when the bond is in the hands of a *bona fide* holder, to say that the subscription therein specifically recited was not made. That disposes of this plea.

Another defense is that the act of March 23d, 1868, under which these bonds were issued, was unconstitutional, and that that has been held to be so by the Supreme Court of the State of Missouri in several recent cases in two respects; one because the constitution requires the assent to this subscription to be given by two-thirds of the qualified voters of the township, whereas the act of 1868 authorizes that assent to be given and the subscription to be made, if two-thirds of the qualified voters voting at

the election shall assent. That presents a question upon which there has been a great conflict of judgment between the supreme court of the state and the Supreme Court of the United States. In the Linn County case, 44 Mo., 504 (1869), the question of the issue of bonds under this act came before the supreme court, and they actually compelled by *mandamus* a reluctant county court to issue bonds under this very act, and of course it was implied in that judgment that the act under which these bonds were issued was constitutional. The particular point, perhaps, now urged against the validity of this act was not before the court.

A hundred cases—and I do not think I exaggerrate—have been brought on these township bonds in the Federal courts of this state, and prior to the decision of Harshman v. Bates County, 3 Dillon, 150, s. c. 92 U. S., 569, 3 Cent. L. J. 506, none of the able lawyers defending these cases ever made a point that the act of March 23d, 1868, was unconstitutional. But when the case to which I have just adverted went to the Supreme Court of the United States, counsel did make that question, and that court, in its first decision on the question, held that the point was well taken, and that the act of March 23d, 1868, was unconstitutional.

The same question was brought before the Supreme Court in another case, Cass County v. Johnson, 5 Cent. L. J. 506,—and more deliberate consideration was given to it; and it reversed its first judgment, and held that this act was not open to the constitutional objection urged. That is the last judgment of the Supreme Court of the United States on this question. Since that decision the Supreme Court of Missouri held that the act is in conflict with the constitution on that ground, and also that the fifth section, which in effect requires that the proceeds of state and county taxes on railroad property be applied to the liquidation of these bonds, invalidates it. And it is an undisputed fact that the law of the State of Missouri has been declared by the supreme court to be, that these bonds can not be enforced, and that, if this action was in a state court instead of here, it is agreed that the defendant would have judgment.

Now, the question is, what is the duty of this court, with a judgment of the Supreme Court of the United States in full force and unreversed, declaring these bonds constitutional, and a subsequent judgment of the supreme court of the state holding that this act is in violation of the constitution of the state? That is not a new question in the history of bond litigation in this country. I had occasion to consider it in a case before me at the last term of the United States Circuit Court for the western district of this state, and what I said there, on that occasion, expresses my views on this. Foote v. Johnson County, 6 Cent. L. J. 345.

"There is, therefore, no judgment of the majority of the judges of that learned court that the act of 1868 is unconstitutional. It is the duty of this court, then, to follow the judgment of the Supreme Court of the United States. But even if the Supreme Court of Missouri had, in its recent judgment, for the first time pronounced the act of 1868 unconstitutional, it is our judgment that in this class of cases the Supreme Court of the United States, as to bonds antecedently issued, would not, under the circumstances, feel itself bound to change its decision to conform to the decision of the supreme court of the state.

"The Supreme Court of the United States considers questions arising upon negotiable municipal bonds issued under state authority, to relate to commercial securities, and not to present questions of mere local law; and where such securities have been issued before any decision of the state tribunals denying the validity of the act authorizing the issue, the Supreme Court has declared that in protecting constitutional rights of creditors it will decide for itself whether, under the constitution and laws of the state, such securities are valid or void. Township of Pine Grove v. Talcott, 19 Wall. 666; Olcott v. Supervisors, 16 Wall. 678. The cases last cited related to bonds which had been issued under acts which had been declared unconstitutional by the Supreme Court of Michigan in the one case, and by the Supreme Court of Wisconsin in the other, *after* the bonds in question had been issued. The duty of the Supreme Court of the United States to follow the judgment of the supreme court of the state was strongly urged by counsel. But the Supreme Court was of a different opinion, and in the case first cited, Mr. Justice Swayne expresses the views of the court on the subject in language so emphatic and decisive, as not to be mistaken. He says: 'The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of the states where the cases arise. It must hear and determine for itself. Here commercial securities are involved. When the bonds were issued, there had been no authoritative intimation from any quarter that such statutes were invalid. The legislature affirmed their validity in every act by an implication equivalent in effect to an express declaration. And during the period covered by their enactment, neither of the other departments of the government of the state lifted its voice against them. The acquiescence was universal. The general understanding of the legal profession throughout the country is believed to have been that they were valid. The national Constitution forbids the states to pass laws impairing the obligation of contracts. In cases properly brought before us, that end can be accomplished unwarrantably no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the courts of the respective states, we should abdicate the performance of one of the most important duties with which this tribunal is charged, and disappoint the wise and salutary policy of the framers of the Constitution in providing for the creation of an independent Federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery.' See, also, Gelpeke v. Dubuque, 1 Wall. 175, 205, 206; Butts v. Muscatine, 8 Wall. 575.

"This court must therefore hold the act of March 23, 1868, to be constitutional, in conformity to the opinion of the Supreme Court of the United States.

The demurrer to the petition is, accordingly, overruled."

And this is our own judgment now.

There is another plea here to the effect that, in point of fact, two-thirds of the qualified voters of the township did not vote for this subscription, but it alleges no notice of that fact to the bond-holders; and the recital in the bond is that this subscription is authorized by a vote of more than two-thirds of the voters, and that the vote was duly taken. It is urged, however, that inasmuch as there are provisions of law in force requiring the registration of voters, and this requirement was embodied in the constitutional provisions, that that makes a distinction between this case and the case decided by the supreme court, where the requirement of a precedent vote was by a mere statute. It makes no difference in principle that the requirement of a two-thirds vote is contained in a provision of the constitution rather than a legislative enactment.

The demurrer to the pleas will be sustained.

NOTES OF RECENT DECISIONS.

FIRE INSURANCE—EFFECT OF FORECLOSURE—INTEREST OF LIENOR AND TRUSTEE—EVIDENCE—NOTIFICATION BY AGENT — CUSTOM.—*Bishop v. Clay F. & M. Ins. Co.* Supreme Court of Errors of Connecticut, 7 Ins. L. J. 828. Opinion by PARDEE, J. The policy insured "the trustees of the convertible mortgage of the N. H. M. & W. R. R. Co'," etc. It provided that "if the property be sold or transferred, or any change takes place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance," the policy should be void; also, that "when property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased," the insurance should terminate. The insurance was effected by plaintiffs, acting as trustees for the second mortgage bondholders then in possession and use of the property, the equity of redemption still existing, Subsequently the title of the owners and convertible bondholders was extinguished by foreclosure in the interest of the first mortgage bondholders, who took possession and appointed plaintiffs as their agents to operate the road. The foreclosure decree recognized an indebtedness of the road to plaintiffs for money advanced, which was made a lien to take precedence of the first mortgage. The property was subsequently conveyed to a new corporation, subject to this lien, and the agency of plaintiffs ceased. *Held*, (1.) That the foreclosure was a change of title and possession by judicial decree, which avoided the policy. (2.) That the interests of plaintiffs as lienors was individual and wholly distinct from their interest as trustees, and was not insured under the policy. (3.) That the nature of the trusteeship not being general, but specified as that of convertible bondholders, parol evidence is not admissible to show that the plaintiffs insured their personal interest. 2. Evidence was offered of a custom on the part of the agent to notify parties insured that a change of title would necessitate a transfer of the policy, and that the notice had been inadvertently omitted. The agent testified that he could not mention an instance of such notice during the period he had acted for the company. *Held*, that the evidence failed to establish a custom such as would control the policy.

ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

[Filed at Ottawa, June 21, 1878.]

Hon. JOHN SCHOLFIELD, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" BENJAMIN R. SHELDON,
" PICKNEY H. WALKER.
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
} Associate Justices.

DEFECTIVE SALE BY GUARDIAN—EFFECT ON PURCHASE.—This is an action by plaintiff to recover a tract of land which had been sold by his guardian under a decree of the circuit court. A number of objections are taken to the validity of the sale of the ward's land by the guardian. It was objected, among others, that the notice of sale did not fix the precise day on which the sale was to be made; that there is no proof that the guardian's report of sale was, in fact, recorded as the law requires, etc. It was shown affirmatively that the land was sold by plaintiff's guardian under a decree of a court of competent jurisdiction for the maintenance of himself and other minor children, and that the same was purchased at such sale in good faith by a stranger to the record, with no notice whatever of any of the defects in the proceedings that it is now alleged existed. SCOTT, J., who delivered the opinion, says: "It will be observed the irregularities that are said to vitiate the sale have relation to the subsequent proceedings after the court acquired jurisdiction in the case. No principle is better settled than that where a court has jurisdiction of the subject-matter, and of the persons to the litigation, its judgments, or decrees when called into question collaterally, will be held valid, and notwithstanding the court may have proceeded irregularly, a purchaser in good faith, under its judgments or decrees will be protected. 80 Ill. 307. A proceeding by a guardian to sell real estate for the maintenance of his ward is a proceeding *in rem*, being made on behalf of the owner of the estate, and hence it was only necessary that the court should have jurisdiction of the subject-matter. According to our understanding the sale under the decree, although in some respects irregular, there having been jurisdiction in the court, divested plaintiff of the title to the property," DICKEY, J., dissenting, says: "I dissent from the doctrine of the court in this class of cases. The statute prescribes the mode in which the property of minors may be taken from them. I think that in such cases the mode prescribed must be pursued, and no title passes unless every condition prescribed by the statute has been fulfilled." Affirmed.—*Spring v. O'Kain.*

MANDAMUS—OPENING PUBLIC ROADS— TERMINI.—This was a petition for a writ of *mandamus* to the commissioners of highways to compel them to open a public road, which had previously been laid out by them. The answer set up various reasons why the writ should not be issued. The road was laid out one mile in length. No question is made as to the laying out of the road, or the regularity of the proceedings in that respect. But the point is made that the road at its east end has no outlet, it not opening into any other road, but terminating on private property; hence, it is claimed, that as the road is not a thoroughfare but a *cul de sac*, that it is not a public highway, and authorities under the common law are cited which go in support of the position. SHELDON, J., who delivered the opinion, after discussing the question, concludes: "It is not to be conceded that that is the doctrine of the common law. 14 Eng. L. & Eq. 69; 24 N. Y. 559; 67 Me. 460. But however that may be, we do not regard the doctrine as applying to a public road laid out as

such, according to the provisions of our statute. * * * * The statute requires that the order laying out the road shall declare it to be a public highway. It contains no qualifications whatever in respect of the road being a thoroughfare, only requiring the petition for the road to state the point of commencement and termination, leaving it with the commissioners of highway to determine whether or not the public good requires a road with such *termini*." Affirmed. — *Sheaff v. People.*

PARTNERSHIP — BANK DEPOSIT — PAYMENT TO ONE OF THE PARTNERS.—A, B, C and D were in partnership under the firm name of The Chicago Seed Co. They deposited money with the First National Bank, and drew checks against it in their business. After the great fire the partnership business was not further prosecuted, and E, on a check drawn by him as "superintendent of the Chicago Seed Co." drew out the balance of this deposit and had the same placed to his individual credit, and subsequently used it in his private business. This is a suit by the firm in assumpsit against the bank for the amount thus drawn out by E. Judgment below was in favor of defendant, and plaintiff appeals. SCHOLFIELD, C. J.: "We think the judgment below must be affirmed, because the plaintiffs have misconceived the tribunal to which they should resort for relief. It is very clear that the payment of $1,700 is good as against the plaintiff E. Being complete as to him, it is, in a court of law, good as to his co-partners, and a court of equity is alone competent to grant the relief to which they claim to be entitled, 9 Barn. & Cress. 532; 7 Man. & Gran. 264; 11 Cush. 62; 10 N. H. 15. The defense here is not the set-off of the individual account of one of the partners, as it was in M. Co. v. Carver, 42 Ill. 66; Casey v. Carver, 42 Ill. 225; McNair v. Platt, 46 Ill. 211; but the payment of the debt to one of the members of the firm, and hence those cases are not in point." Affirmed.—*Church v. First National Bank.*

CORPORATIONS—SERVICE OF PROCESS ON SECRETARY—AMENDMENT OF SERVICE.—This is a writ of error to reverse a judgment rendered by default, against a corporation, on a return of service in the following words: "The president of the within named company not being found in my county, served this writ by reading and delivering a copy thereof to Wm. H. Jenkins, secretary of said company, this 13th day of June, A. D. 1876. F, A., Sheriff." On the 15th day of June, on due notice, the court granted leave to the sheriff to amend this return, and the following amended return was made: "Served this writ by reading and delivering a copy thereof to Wm. H. Jenkins, by direction as secretary, this 13th day of June, 1876." Objections are made, first, that the service of process was not sufficient to authorize the court to render judgment by default, and second that the sheriff had no right to amend his return. CRAIG, J.; "It is clear the service, as shown by the amended return, is fatally defective. In the first place, it does not appear by the return that the president of the corporation was not found in the county, as the act requires, before process could be served on one of the other officials but even if the service had shown the president not found the service on Wm. H. Jenkins, "as secretary," could not be sustained. The service on Jenkins, as secretary, was not a service on the secretary of the company. See 24 Ill. 319. * * * In regard to the question of amendment of the return, we have carefully examined the cases cited, and, while we are free to concede that there are some authorities which might sustain the position of the defendant in error, we are constrained to hold the weight of authority against him; and, under the former decisions of this court, which we see no good reason to overrule, the amendment was proper. See 43 Ill. 260; and 57 Ill. 226, where former decisions of this court, on this point, were somewhat modified.—*Chicago Plaining Mill Co. v. Merchants' National Bank of Chicago.*

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

July Term, 1878.

HON HORACE GRAY, Chief Justice.
" JAMES D. COLT, }
" SETH AMES, }
" MARCUS MORTON, } Associate Justices.
" WILLIAM C. ENDICOTT, }
" OTIS P. LORD, }
" AUGUSTUS L. SOULE, }

NEGLIGENCE—FELLOW-SERVANT.—The defendants were repairing a building, and employed one H, a carpenter, to superintend the whole job. When the time came for putting on the gutters, F, one of the defendants, told H that he wanted a staging put up; and the staying was erected under the direction of H, who used his own brackets therefor, for the sole purpose of putting on the gutters. F, on the next day, ordered of L, a coppersmith, some copper gutters for the building, and directed him to send a man to put them up. L sent the plaintiff, and when he arrived at the building F was there and directed him where to go to work. There was no evidence of any negligence, except the negligence of H in constructing the staging, which broke while the plaintiff was on it, whereby he fell and was injured. *Held*, that H was a fellow-servant of the plaintiff and that the plaintiff could not recover of the defendants for injuries caused by his negligence. Opinion by MORTON, J.—*Killea v. Fazon.*

INDICTMENT — ASSAULT WITH A DANGEROUS WEAPON.—1. An indictment which charges that F, at a certain time and place, in and upon one H, "with a certain dangerous weapon, to wit: with a pistol then and there loaded with powder and a leaden ball, with which dangerous weapon the said F was then and there armed, feloniously, willfully and of his malice aforethought, did make an assault, with intent, the said H, then and there, with the pistol aforesaid, feloniously, willfully, and of his malice aforethought, to kill and to murder," etc., sufficiently sets forth an assault with a dangerous weapon. 2. Under that indictment, the accusation is not limited to that of an assault with a pistol used as a club or bludgeon, but might be supported by evidence of using the pistol in the way which a loaded pistol is ordinarily used, by pointing and shooting the person alleged to have been assaulted. Opinion by GRAY, C. J.—*Com. v. Fenno.*

VESTED EQUITABLE REMAINDERS. — A testator's will provided, among other things, that "as soon as may be after the decease of my said wife, my said trustees, or their successors, shall convey, transfer or pay to my son and daughter in equal shares all the estate hereby given in trust, if they both survive my said wife. * * * * In case either of them should die in the lifetime of my said wife, leaving no issue, the said estate given in trust shall be transferred or conveyed to the survivor." The testator's wife and daughter survived him, and the daughter died in the lifetime of the widow, leaving issue. *Held*, that the son and daughter each took a vested equitable estate, expectant on the termination of the life estate of the testator's wife, and liable to be divested only on his or her death during the life of the testator's wife, without issue. The interest in the residue was given by the will, not by the conveyance from the trustees. Such con-

veyance is necessary only to make that a legal estate or interest, which, under the will, and prior to the conveyance, was an equitable interest. It was an equitable remainder after the equitable life interest of the testator's wife, and vesting immediately on the death of the testator. Phipps v. Ackers, 9 Cl. & Fin. 583; Ackers v. Phipps, 3 Cl. & Fin. 665; Phipps v. Williams, 5 Sim. 44. Opinion by SOULE, J.—*Weston v. Weston.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF WISCONSIN.

August Term, 1878.

[Filed October 8, 1878.]

HON. E. G. RYAN, Chief Justice.
" ORSAMUS COLE,
" WM. P. LYON,
" DAVID TAYLOR,
" HARLOW S. ORTON,
} Associate Justices.

IN A SUIT TO RESTRAIN EXECUTION OF A JUDGMENT at law, on the ground that the alleged facts upon which such judgment was based did not exist, and that it was taken through the failure of this plaintiff's attorney to defend, and that all the proceedings subsequent to service of summons upon him were taken without his knowledge, he being absent during a large part of the time from the county where such action at law was pending: *Held*, that as the complaint shows *gross laches* on plaintiff's part, and mere negligence on the part of his attorneys (no charge of fraud or collusion being made against them), it fails to state a cause of action. Opinion by ORTON, J.—*Hiles v. Mosher.*

RELIEF SOCIETY — ULTRA VIRES. — Defendant's charter declares that its business "shall be to afford relief to the widows and children of its deceased members, and to such business it shall be limited and restricted." In his application for a policy, the insured declared that in case of his death the moneys should be paid to his wife, and in case she should be dead to his children. Afterwards, by agreement between himself and the company, he undertook to assign such moneys to it as security for his indebtedness to the company for money loaned to him. In an action by his children on the policy: *Held*, that such assignment was void for want of authority in the corporation to take it. Opinion by ORTON, J.—*Dietrick v. Madison Relief Association.*

CHANGE OF VENUE GRANTED ON CONDITIONS — CONSTRUCTION.—1. Where a party to an action applies for an order (as for change of venue), which is granted upon some *condition* (as payment by him of costs), his performance of the condition and acceptance of the benefit of the order is a *waiver* of his right to appeal from that part of imposing the condition. 2. *It seems* that if the order should grant the motion *without condition*, but should further require the mover to pay costs, he might avail himself of the first part of the order and still appeal from the second part, at least before paying the costs, and possibly after. Opinion by TAYLOR, J.—*Flanders v. Town of Merrimack.*

NEGLIGENCE—RAILROAD—INJURY TO SERVANT.—1. One who engages in the service of a railroad company takes upon himself the necessary and usual risks of the service, and is bound to exercise that degree of caution which persons of ordinary prudence would use under the same known conditions of danger. 2. Where a railroad employee, engaged in removing ashes, etc., from a side track in depot grounds, was injured by a train set off upon said track: *Held*, in an action against the railroad company for the injury, that plaintiff had a right to act upon the belief that such train would be operated and run through the grounds as other trains had been uniformly operated and run there; and where there was proof that the bell was usually rung before starting a train at that place, and no proof that the trains were run there habitually, at an unlawful speed, and there was evidence tending to show that the train in question was run at an unlawful speed and without ringing the bell at starting or giving the plaintiff other warning, the question of defendant's negligence was for the jury. 3. Where plaintiff was compelled to act at once in the presence of imminent danger, he can not be held guilty of contributory negligence as a matter of law, merely because he did not choose the *best means* of escape from danger. 4. One who signs a discharge or acquittal without knowing its contents or intending to sign such an instrument, is not bound by it. Opinion by LYON, J.—*Schultz v. C. & N. W. R. R.*

SERVICE ON MINORS—GUARDIAN—NOTICE—JUDGMENT.—1. The statute regulating service of summons upon minors under the age of fourteen (sec. 10, ch. 125, Rev. Stats. 1858) must be strictly followed; and it requires a delivery of a copy of the summons to the minor in person, and of another to the father, mother, or guardian, for the minor; and a delivery of a copy to such father, mother or guardian for himself or herself as a party to the suit, is not a substitute for the second part of this requirement. 2. Where the court fails to acquire jurisdiction of a minor by due service upon him, its subsequent appointment of a guardian *ad litem* for him will not cure the defect of jurisdiction. 3. In an action to redeem lands conveyed to defendant or his grantor by a deed absolute on its face, the burden is upon the plaintiff to show that the relation of debtor and creditor existed between the grantor and grantee in such deed after its delivery, and that it was intended as a mere security. 4. One who purchases land with knowledge of such facts as would put a prudent man upon inquiry as to the existence of a parol defeasance of the recorded deed under which his vendor claims, which inquiry would enable him to discover the true nature of his vendor's title, is chargeable with notice. 5. The record of an action and judgment touching land (where such judgment is not recorded in the registry of deeds as a conveyance of title) is not constructive notice to one who is not compelled to trace his title through such judgment, but can show an apparently perfect title independent of it. 6. A judgment will not operate as constructive notice in favor of one named as a party therein, in respect to whom such judgment is void. Opinion by COLE, J.—*Helms v. Chadbourn.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

May Term, 1878.

[Filed October, 1878.]

HON. WILLIAM E. NIBLACK, Chief Justice.
" HORACE P. BIDDLE,
" JAMES L. WORDEN,
" GEORGE V. HOWK,
" SAMUEL E. PERKINS,
} Associate Justices.

LICENSE TO SELL LIQUORS—EFFECT OF REPEAL OF STATUTE.—Appellant was refused a license to sell liquors by the board of commissioners, on the ground that he was ineligible under the statute, having formerly violated a provision of the same, which violation rendered him ineligible to obtain a license for the pe-

riod of five years. The proceedings which resulted in the judgment of forfeiture and ineligibility, were founded upon the statute of 1873, which was repealed by act of 1875. *Held*, that the ineligibility imposed upon the appellant was that another permit could not be granted to him for a certain period under said act of 1873, and when that act was repealed such ineligibility ceased to have any practical application, and fell with the repeal of the act. Again, the act of 1875 does not recognize the kind of disability imposed by the act of 1873. The application in this case should have been considered in the same manner as if there had been no previous legislation on the subject, and with sole reference to the provisions of the act under which the application was made. Judgment reversed. Opinion by NIBLACK, C. J.—*Golden v. Bingham.*

SUSPENSION OF ATTORNEY FROM PRACTICE—MANDAMUS—EFFECT OF APPEAL ON JUDGMENT.—Petition by Walls for a writ of mandate against Palmer, judge of the circuit court, to compel him to restore the petitioner to practice as an attorney, he having been suspended from practice by the court. *Held*, that when an attorney has been improperly disbarred by a judgment which is a nullity, the writ of mandate is a proper remedy to restore him to his rights; but when he has been properly suspended or disbarred, the writ will not lie. 9 Wheaton, 529; 36 N. Y. 651; 7 Wall. 364. The petition in this case does not show that the judgment suspending the petitioner was an improper one. It is urged that the appeal and supersedeas, by staying the judgment of suspension, has the effect of restoring the petitioner to his rights as an attorney during the pendency of the appeal. The effect of the appeal is to stay the judgment of suspension as it is, and prevent further proceedings against the petitioner, but will not allow the party appealing to do any act which, by the judgment, he is forbidden to do. Petition denied. Opinion by BIDDLE, J.—*Walls v. Palmer.*

PROMISSORY NOTE—INDORSEMENT—PLEADING.—Suit aganst the indorsers on a promissory note. The complaint alleged the filing of a copy of the note with the complaint, but said nothing concerning a copy of the indorsement. A copy of the note was filed, fol-, lowed by what purported to be a copy of the indorsement. The action being founded on the indorsement, the question was whether the complaint was sufficient. without alleging that a copy of the indorsement was filed. *Held*, that the complaint was insufficient. The note and the indorsement were different instruments, conferring different rights and imposing different obligations, though written upon the same paper. Judgment reversed. Opinion by WORDEN, J.—*Sinker v. Fletcher.*

GUARDIAN'S BOND — LIABILITY OF SURETIES UPON.—The proper court has authority in this state to require a guardian to give an additional bond as security for the general discharge of the duties of his trust, and suit may be brought upon such additional bond before the original bond is exhausted, or the securities thereon shown to be worthless. But if there should be separate bonds given with different sureties, and one bond is intended to be subsidiary to and a security for the other, in case of a default in payment of the latter, and is not intended to be a primary concurrent security, in such case the sureties on the second bond would not be compellable to aid those on the first bond by contribution. When such intention does not appear the obligors on the second bond are liable for breaches of it, either in a separate suit upon such bond, or in a joint suit against them, and the obligors on the first bond, upon both bonds. In this case the second bond was a primary concurrent security. Judgment affirmed. Opinion by PERKINS, J.—*Allen v. State.*

NEGLIGENCE OF AGENT—LOSS OF COMPENSATION FOR SERVICES.—Dynes & Co. sued Mrs Fisher for a real estate commission for effecting an exchange of property for her upon the following proposition; "Ruddall & Vinton: I will give you my two-story brick house for your lot, etc., and $1,200 in money. Both properties to be conveyed by deed of warranty, free from all incumbrances, and deeds to be exchanged and money paid within five days from date. April 26, 1875. Asa Fisher. Accepted May 1, 1875. Randall & Vinton." Performance of the contract was duly tendered to Dynes & Co., agents for Mrs. Fisher, by Ruddell & Vinton. But when the deed from Mrs. Fisher was tendered, it was refused, because drawn subject to the incumbrance of one year's taxes. A member of the firm of Dynes & Co. drew the deed and tendered it in that manner without authority from Mrs. Fisher and without calling her attention to the variance in its terms from the contract, and did not inform her of its rejection by Ruddell & Vinton for that reason. PERKINS, J. *held* that this was such gross negligence on the part of the agent as to cause a failure of the business he was employed to accomplish, and his services being worthless he can not recover compensation for them. Judgment reversed.—*Fisher v. Dynes.*

ABSTRACT OF DECISIONS OF SUPREME COURT COMMISSION OF OHIO.

December Term, 1877.

[Filed October 23, 1878.]

HON. W. W. JOHNSON, Chief Judge.
" JOSIAH SCOTT, } Judges.
" D. T. WRIGHT, }
" LUTHER DAY, }
" T. Q. ASHBURN, }

A PERSON WHO VOLUNTARILY ATTEMPTS to pass over a sidewalk of a city which he knows to be dangerous by reason of ice upon it, when he might easily avoid it, can not be regarded as exercising ordinary prudence, and therefore can not maintain an action against the city to recover for injuries sustained by falling upon the ice, even if the city would otherwise have been liable. Judgment affirmed. Opinion by DAY, J.—*Schaefler v. City of Sandusky.*

JURISDICTION—JUDGMENT. — 1. The jurisdiction of a court or tribunal entering a judgment in any particular case, may always be inquired into, when such judgment is made the foundation of an action, either in a court of the state in which it was rendered, or of any other state. 2. A personal judgment rendered against one over whom the court has no jurisdiction, is wholly invalid. 3. Where, in a promissory note, payable at a future day, a warrant of attorney is incorporated, authorizing any attorney to appear for the maker in any court, and confess a judgment for the sum named in note, etc., such warrant of attorney does not authorize the entry of an appearance, etc., before the maturity of the note; and an appearance prematurely entered by virtue of such a warrant confers on the court in which it is entered no jurisdiction of the person of the maker. Judgment affirmed. Opinion by SCOTT, J.—*Spier v. Corll.*

MASTER AND SERVANT—DUTY OF EMPLOYEE.—1. If an employee enters into or remains in the service of a railroad company, with a knowledge of its rules and regulations, he must be held as undertaking to acqui-

esce therein, and if he is afterwards injured, by reason of his violation of such rules and regulations, he can not claim that their reasonableness is a question to be decided by a jury, in an action by him to recover damages for the injury thus occasioned. 2. If the employee has suffered an injury, brought about by a violation of the plain instructions of his principal, he can not hold his principal liable therefor. Judgment of the district court affirmed. Opinion by WRIGHT, J. Johnson, C. J. and Scott, J., dissenting.— *Wolsey v. L. S. & M. S. R. R.*

BOOK NOTICE.

REMINISCENCES OF THE BENCH AND BAR OF MISSOURI, with an Appendix, containing Biographical Sketches of nearly all the Judges and Lawyers who have passed away, together with many interesting and valuable letters never before published of Washington, Jefferson, Burr, Granger, Clinton and others, some of which throw additional light upon the famous Burr conspiracy. By W. V. N. BAY, late Judge of the Supreme Court of Missouri. St. Louis: F. H. Thomas & Co. 1878.

This volume certainly does credit to both author and publisher. The peculiar fitness of the author for such an undertaking has led many of his friends to look for its appearance with much interest, and we are inclined to think that their expectation of a rich and instructive entertainment will not be disappointed. The reminiscences go back to the earliest territorial period, and embrace such records and recollections as the diligence of the writer could gather up concerning the most noted of the lawyers and judges of the state who have hitherto passed to their final account. Most of them have died within the time of the author's personal observation, and as he came into the legislature as early as 1842, and was for several years a representative in Congress, and later was a judge of the Supreme Court, and practiced at the bar among them, he had good opportunities of becoming acquainted with their personal traits and characteristic merits, and with the principal events of their lives and times.

Where so many were to be noticed, a brief space only could be devoted to each one; but the author has succeeded in reviewing the most important facts, and, in some instances, has given very full sketches of their lives. The book opens with an excellent portraiture of Thomas Hart Benton, the senator of six lustrums. There is an interesting account of Rufus Easton, with *facsimiles* of letters of Aaron Burr, Thomas Jefferson and Gideon Granger, touching the famous Burr conspiracy, found among Mr. Easton's papers. A fine portrait of Rufus Easton makes an attractive frontispiece. Among other sketches that are particularly well drawn may be mentioned those of Judge Silas Bent, Judge Lawless, Governor Gamble, Beverly Allen, Bates, Scott, Leonard, Hayden, Ryland, Geyer, Mullanphy, Wright, Willis L. Williams and Wilson Primm. The entire list comprises one hundred and fifty-five names.

The author has endeavored to catch the distinguishing features in each individual portrait, and has succeeded remarkably well in the difficult task of discriminating so many characters, one from another. There is an agreeable variety of anecdote. Of course, much wit and humor are to be expected in such company, and, in these instances, drawn from the frontier life of a new state, into which strong men are apt to gather and grow up amidst some roughness of manners, the reader should not be surprised if some down-right expressions should grate a little harshly upon saintly ears.

On the whole, this work is very well written, and will be a creditable monument to the industry and judgment of the writer, as well as to the memory of the many able and worthy men, whose lives he has recorded. It is evident that he has been very indulgent to the faults of some of them. He has not forgotten the rule *de mortuis nil nisi bonum:*

> "Be to their faults a little blind,
> Be to their virtues very kind."

It is sad to contemplate in how many instances the fatal vice of intemperance (of which we get some glimpses as through a thin veil) has in the end blighted the hopes of the fairest beginning.

Some errors are almost inevitable in such a work, but we have not observed many of much importance. The statement, on page 305, that Judge Bates held the office of judge of the St. Louis Land Court "until his death in 1869, when Judge Lord was appointed to succeed him," must be an oversight, as Judge Lord was certainly appointed upon the resignation of Judge Bates at an earlier date. The frequent occurrence of the judicial and editorial *we*, which the author's modesty leads him to use instead of the more personal *I*, sometimes sounds a little oddly.

The work fully justifies the opinion which has been often expressed, that, in the early history of Missouri, a galaxy of men of remarkable ability and learning in the law was brought together, more especially from Virginia, Maryland and New England, Kentucky and Tennessee, and even from Ireland and France, to whose genius, great abilities and faithful exertions we are directly indebted for the solid foundations that were laid in the beginning of the laws and jurisprudence of the state. We imagine that Judge Bay's labors can not fail to interest the public at large, as well as the legal profession and the families and descendants of the deceased worthies.

QUERIES AND ANSWERS.

[Correspondents in this department are requested to make their questions and answers as brief as possible. Long statements of facts of particular cases will be rejected Anonymous communications will not be noticed.]

QUERIES.

69. A MAN OWNS TWO CITY LOTS which adjoin each other. He builds a building on one of them, one-half of the east wall resting on each lot. He mortgages each lot to different parties at different times, which mortgages are foreclosed and bid in by different purchasers. Now what are the rights of the purchasers with respect to the wall? M.

70. CONTRACT—INFANCY—SURETY.—At the age of twenty, A bought of B personal property, for which he gives a promissory note of $500, with C (a man of majority) as surety. The property in question was represented by the vendor to the vendee as being worth $900, upon which representations the vendee was induced to purchase said property. A received said property soon after said purchase, but found the true value to be but $700, in place of $900. The note is now due. Can A sustain a plea of infancy? Can A sustain a plea of no consideration, and to sustain the other must A return to B the property received? Can C set up the same plea of defense as A? W.

Lincoln, Ill,

71. IN THIS STATE—West Virginia—the distinction is still preserved between law and chancery jurisdiction, except that the same courts possess both; there are not separate courts, as in Tennessee. A loans B

$100, and takes his note. C, the father-in-law of B, told him he would pay the note to A, who was the son of C, and therefore a brother-in-law of B. But A still held the note of B, and there was no privity between A and C. When the note became due, C receded from the contract with B, but nevertheless B went and represented to A that C said he would pay off the note, and that he should surrender the note to B. A, confiding in the representation, surrendered it. Afterwards he learned that B's representation was false. A wants to sue B for the amount of the note, but B has possession of it. If A was in possession he could sue in debt or assumpsit: but not being in possession, how could he sue, and what kind of a suit should be brought? If it should be a suit at law, what kind? If not a suit at law, how, then, should it be brought? D. F. P.

NOTES.

THE NEBRASKA STATE BAR ASSOCIATION assembled at Lincoln on the 17th inst.——In the Supreme Court of Missouri the first 109 cases on the October docket have been submitted, and the court has announced that no new cases will be heard "until further notice."——The next term of the United States Circuit Court for the Western District of Missouri, opens at Jefferson City on the third Monday in November.——A bill is before the Vermont legislature to reduce the salaries of the judges of the Supreme Court from $2,500 to $2,000 a year.——A correspondent writes: "Is there any way of reconciling Cromwell v. County of Sac, 6 Cent. L. J. 209, with Burnhisel v. Firman, 22 Wall. 209. In the latter case the notes were held *valid*, but that they should *not* draw interest *after maturity* at a greater rate than prescribed by statute. The notes were payable "in one year from date, with interest at 25 per cent." In the former case the bonds bore interest, by their terms, at the rate of 10 per cent. until maturity; and the court held that they should draw the same rate after maturity, although there was no stipulation to that effect in the bonds. The court, in deciding Cromwell v. Sac County, commented upon Brewster v. Wakefield, 22 How. 118, but makes no mention of Burnhisel v. Firman. Is the distinction to be found in the fact that, in Iowa, where Cromwell v. Sac County arose, the law had been settled by the decisions of its court of last resort, and the Federal court simply followed those decisions, while in the Burnhisel case no such prior decisions were brought to the attention of the court? If so, it is easily understood. The Burnhisel case, coming from a territory (Utah), would be ruled by Brewster v. Wakefield, 22 How. 118, and both cases clearly hold that in the absence of state court decisions to the contrary, and as an open question of construction, commercial paper, written as that above referred to was, only draws interest at the stipulated rate to *date* of *maturity*, where the stipulated rate is greater than that provided by statute. That is the clear result of those two decisions. And yet, in the last case, it is said that the preponderance of *opinion* (in the state courts) is in favor of the doctrine that the stipulated rate of interest attends the contract until it is merged in the judgment, with which preponderence of opinion, *as an original proposition*, the Federal court does not concur.

MR. JUSTICE MILLER has been giving some personal reminiscences of the court of which he is so distinguished a member, to a correspondent of a Cincinnati newspaper. Of Chief Justice Taney he says: "I knew Mr. Taney well, having been nearly three years on the bench with him. You see that the secession of the Southern States took away three of the judges, Mr. Campbell having been one. We three came in as Republicans—a very decided innovation on the bench where Taney had sat so long. His treatment of us all was kind and cordial. He gave me directions to write on cases of moment. At the end of that term, as we were about separating, I said to the chief justice that I was much pleased with our present relations, and had formed a great deal of respect for his character. He replied that at no time during his presidency of the bench had the prevailing feeling been so harmonious as during that term of the court. One day a venerable old gentleman, Judge Shepley, from the State of Maine, father of the United States Judge who recently died in New England, came before our court and made an argument. He was exceedingly venerable and dignified, and had been a senator from Maine. When the court adjourned that day, this old gentleman followed into the robing-room, and said. 'Mr. Chief Justice, I voted in the Senate to confirm you, nearly forty years ago, for the position you now fill, and I am glad to have to add that I see no reason to regret that vote.' 'I remember you very well,' replied the Chief Justice, 'and your vote on that occasion, sir. Had I been confirmed by the Senate for the first offices which President Jackson gave me, I should have been an obscure lawyer in Maryland at the present day; but 'Old Hickory' had a way of sticking by his friends, and each time the Senate refused to confirm me he moved me up in the rank of appointments, until, instead of being a Cabinet Minister for a little while, or a foreign appointee, I reached the Chief Justiceship.' He was one of our best lawyers before he got upon the bench, practicing before the old common-law courts of Maryland, and being retained in the most difficult cases. His mind was lucid and clear, and his decisions were writen with great carefulness and plainness. He illustrated the simple virtues of the slaveholder of the olden times by kneeling in the Catholic church beside his aged negro servant, both of them communicants. Taney had been a Federalist before he became a Democrat, and his decisions were nearly all in line with the old Federal traditions. The lawyers and judges throughout the country are generally of the opinion that he was one of the purest and most accomplished judges we ever had." Judge Miller then turned to Chief Justice Taney's successor. "I am disposed," said he, "to take a very high view of the quality of Chase's mind. He was slow and massive with a vigorous brain, and I have often said that I know of no one against whom I should undertake to measure myself with more diffidence than Chase. He liked to have his own way; but when he came upon the bench it was admirable to see how quietly and courteously the court resisted his imperious will, never coming to direct conflict, and he finally had to take the position which he held, viz.: the moderator and presiding officer over the Supreme Court, and not possessed of any more authority than the rest of the bench chose to give him. Toward the end of his days he said to me, 'Judge Miller, you have promised me repeatedly to come out and make me a visit, and I will not take a denial from you this time. You must come out before you leave the city of Washington.' I went out to the place, and made a pleasant visit there, but reminded the Chief-Justice of what he had forgotten, that it was the second and not the first visit. His mind was weakening somewhat at that time, and he said to me: 'I find my memory growing infirm; I did not know that you had been here before.' 'I asked Chief Justice Chase,' said Judge Miller, 'if he had taken any steps to have his papers placed in competent hands to write his life.' Chase replied: "No, sir. Believing in the Christian religion, as I do, implicitly, and as I was bred, I think nothing of posthumous reputation and have not labored to save for it. When I die my satisfaction will be no more in this world's admiration.'"